

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-2082

REGSCAN, INC.,

Appellant

v.

DEAN MARK BREWER; KEVIN SPENCE;
BRUCE REGAN; GARY TABBERT;
CITATION PUBLISHING, INC.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(No. 04-6043)
Honorable Michael M. Baylson

Argued: March 24, 2008

Before: McKee, Rendell and Tashima,* Circuit Judges,

(Filed: August 14, 2008)

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* Honorable A. Wallace Tashima, Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Counsel for Appellant Regscan Inc.

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Counsel for Appellees

OPINION

McKee, *Circuit Judge*:

_____RegScan appeals the district court's grant of summary judgment in favor of defendants on claims RegScan brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). For the reasons that follow, we will affirm.

I.

We review the district court's grant of summary judgment *de novo*. *Petruzzi's IGA Supermarkets v. Darling-Delaware Co.*, 998 F.2d 1224, 1230 (3d Cir. 1993). When an appellant argues that an order granting summary judgment was premature, we review the refusal to delay action for an abuse of discretion. *Pastore v. Bell Tel. Co.*, 24 F.3d 508, 510 (3d Cir. 1994).

The application of *res judicata* is governed here by Pennsylvania law. *See, e.g., Allegheny Int'l v. Allegheny Ludlum Steel Corp.*, 40 F.3d 1416, 1429 (3d Cir. 1994).

Under Pennsylvania law, “a final valid judgment upon the merits by a court of competent jurisdiction bars any future suit between the same parties or their privy on the same cause of action.” *Dempsey v. Cessna Aircraft Co.*, 653 A.2d 679, 680-82 (Pa. Super. 1995).

“Invocation of the doctrine of *res judicata* (claim preclusion) requires that both the former and latter suits possess the following common elements: (1) identity in the thing sued upon; (2) identity in the cause of action; (3) identity of persons and parties to the action; and (4) identity of the capacity of the parties suing or being sued.” *Matternas v. Stehman*, 642 A.2d 1120, 1123 (Pa. Super. 1994) (citation omitted).

II.

Inasmuch as we write primarily for the parties who are familiar with this case, we need not reiterate the factual or procedural background except insofar as may be helpful to our brief discussion.

RegScan argues that the state court’s denial of the motion to amend was not a judgment on the merits because it consisted of a one sentence order. However, as noted by the district court and the Defendants, the state court sanctioned the Plaintiff for bringing the motion to amend. In its opinion granting sanctions, the state court explained that RegScan’s RICO claims were “not warranted by existing law” nor was there “any nonfrivolous argument for the extension or modification of existing law.” This can only be read as a decision that an amendment to the complaint would be futile - and under the law of most jurisdictions - that is a judgment on the merits. *See ITT v. Intelnet*, 366 F.3d

205, 211-212 (3d Cir. 2004) (looking to statements made by state court at motions hearing to determine whether denial of motion to amend was a resolution on the merits). We therefore reject RegScan's attempt to define the state court decision as procedural rather than substantive.

RegScan next argues that the district court incorrectly concluded that there was an "identity of the capacity of the parties" between the Pennsylvania and federal suits. It does not challenge the court's ruling on the other three *res judicata* prongs. RegScan claims that it is suing the individual defendants in their individual capacities, and not as officers, directors, and/or employees of Citation. An examination of the proposed amendment to the state court complaint and the federal complaint shows that all of the alleged actions of the defendants were undertaken as representatives and agents of Citation. Thus, the district court correctly concluded that the fourth prong of Pennsylvania's *res judicata* doctrine has been met.

III.

Finally, we conclude that it was not an abuse of discretion for the district court to rule on the Defendants' summary judgment motion without allowing further discovery. In *Bradley v. United States*, we held that "in all but the most exceptional cases, failure to comply with Rule 56(f) is fatal to a claim of insufficient discovery on appeal." 299 F.3d 197, 207 (3d Cir. 2002) (citation omitted). It is undisputed that RegScan failed to submit a Rule 56(f) affidavit prior to the district court's decision. We find no exceptional

circumstances on this record that would excuse that failure.

IV.

For the foregoing reasons, we will affirm the judgement of the district court.